

# REAL ESTATE & ENVIRONMENTAL LEGAL UPDATE



## GOVERNOR SIGNS PART 201 REFORM PACKAGE

by Sharon R. Newlon and Karolyn A. Zande



On December 14, 2010, Governor Jennifer Granholm signed a package of bills approved by the State House and Senate that will substantially reform Part 201 of the Natural Resources and Environmental Protection Act ("NREPA"), Michigan's general environmental cleanup, liability and brownfield legislation. The reforms are immediately effective. The Part 201 Reform Package includes revisions designed to streamline and

encourage remediation activities completed under Part 201. This article summarizes the top 10 changes you need to know about this law.

### 1. There is a new definition of "Baseline Environmental Assessment."

The definition of "baseline environmental assessment" ("BEA") is amended to refer to the document resulting from "all appropriate inquiry" (as defined by the 2005 ASTM Phase I standard) and sufficient sampling to establish that the property is a "facility" (impacted above unrestricted residential cleanup criteria). BEAs will no longer need to distinguish existing impacts from potential new impacts, and the Department of Natural Resources and Environment ("DNRE" soon to be MDEQ again) will no longer offer formal determinations of their adequacy.

### 2. Due Care obligations are altered to align better with EPA "continuing obligations" requirements.

The Part 201 Reform Package requires owners of "facilities" to: (1) provide reasonable cooperation/access to persons conducting cleanup, (2) comply with established land use or resource use restrictions, and (3) refrain from interfering with restrictions or response activities. The reforms eliminate the due care exemption for local governments if they invite the general public to use the property.

### 3. The "response activity" concept replaces "remedial action."

The Reform Package replaces the concept of "remedial action" with "response activity," a term that encompasses all steps in the remediation process, including site evaluation, feasibility studies, partial and complete cleanups and self-implemented cleanups. Response activity plans (for any qualifying activity) may be submitted to DNRE for review. DNRE has 150 days to approve, impose added conditions, deny, or request more information on a plan from the submitting party. If public participation and input on the plan is necessary, DNRE has 180 days to review. If DNRE does not issue a response, the plan is deemed to be approved.

### 4. It may be easier to get approved.

Instead of merely allowing the approval of site-specific cleanup criteria, the Part 201 Reform Package now mandates DNRE approval of site-specific criteria when those criteria provide more accurate numeric information or, for non-numeric



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criteria, if the site-specific criteria provide better protection to the environment or public than using the general criteria under Part 201.

## 5. Parties will be able to submit no further action reports for DNRE approval.

Upon completion of a response activity or remedial action, the party undertaking an action may now submit a "No Further Action Report" to DNRE describing all actions taken, from which

DNRE can conclude that all remedial actions have been completed pursuant to Part 201. If the cleanup category is other than unrestricted residential use, a party will be required to submit a "postclosure plan" and "postclosure agreement" when seeking a no further action determination. A postclosure plan must include any land or resource use restrictions in detail and any permanent markers used to describe the restricted areas. As with remedial action plans, DNRE will have either 150 (or 180) days to make a decision or the no further action report will be deemed approved by operation of law.

## 6. DNRE technical decisions are appealable to a Response Activity Review Panel.

In a significant departure from the prior law, the reforms establish a procedure for appeals from DNRE determinations regarding a response activity plan or a no further action report to a Response Activity Review Panel. The Panel will consist of fifteen volunteers from outside the DNRE appointed by Director. Five members will hear each appeal and make a recommendation to the Director, with the Director making all final decisions. Those decisions will be appealable to circuit court.

## 7. The number of clean up categories is reduced from ten to four.

The Part 201 Reform Package reduces the number of cleanup categories from ten to four: residential, limited residential, nonresidential, and limited nonresidential. DNRE will need to develop new cleanup criteria for the nonresidential category, and review and revise all cleanup criteria at least once every four years

## 8. Requirements for the groundwater/surface water interface ("GSI") criteria have changed.

The new provisions confirm that the appropriate monitoring point for the GSI criteria is the groundwater/surface water interface itself and that surface water does not include groundwater or enclosed sewers or utility lines. Alternative monitoring points will be allowed, as will mixing zone-based criteria, with DNRE approval and a 30-day public comment period. Permits will not be required for venting groundwater.

## 9. The DNRE will be required to monitor the effectiveness of the program.

The Part 201 Reform Package requires DNRE to keep an inventory of known facilities with information regarding each facility's location, response activity plans, no further action reports, and cleanup category associated with the property. DNRE will be required to post this information on its website, along with quarterly reporting response activity plans approved and disapproved

by DNRE, recommended for approval and disapproval by the Response Activity Review Panel, or approved by operation of law.

## 10. Current rules and future rulemaking are affected by the new legislation.

The Part 201 Reform Package rescinds numerous DNRE rules under Part 201, including those relating to the list of contaminated sites, listed criteria for selecting a remedial action, and site assessment models. It will permit, not require, DNRE to promulgate rules under Part 201. However, the reforms specify that, consistent with Michigan's Administrative Procedure Act, any guidelines, bulletins, or interpretive statements issued by DNRE are not binding on any party.

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## DNR AND DEQ TO BE REINSTATED AS SEPARATE DEPARTMENTS

Governor Rick Snyder issued an executive order on January 4, 2011 splitting the Michigan Department of Natural Resources and Environment back into two separate departments. The departments had recently been combined under an October 2009 executive order by Governor Granholm. Rodney Stokes will serve as director of the Department of Natural Resources ("DNR") and Dan Wyant be the director of the Department of Environmental Quality ("DEQ"). Mr. Wyant will also be the group executive for Quality of Life for Governor-elect Snyder, which will include the DNR, the DEQ and the Department of Agriculture & Rural Development. The Order goes into effect March 13, 2011.



## COLLECTING POST-BANKRUPTCY HOMEOWNERS' DUES

by Doron Yitzchaki

Condominium and homeowners' associations ("HOAs") face unique challenges in this real estate market. In the wake of an ever-rising tide of delinquent dues, member bankruptcies and abandoned homes, members remaining in HOAs are left with increased assessments and fewer services. In the past, some HOAs would be largely out of luck when it came to trying to collect dues accruing after the date a member filed for bankruptcy ("postpetition"), but recent developments in bankruptcy law have provided HOAs greater relief in that regard.

In order to maximize its recovery, an HOA must have a basic understanding of its rights under the Bankruptcy Code.

### Postpetition Dues May Be Nondischargeable

Whether an HOA member has filed for bankruptcy under Chapter 7, Chapter 11, or Chapter 13 of the Bankruptcy Code can make a difference in an HOA's ability to collect the member's delinquent dues. In 1994, as part of the Bankruptcy Reform Act, Congress added a provision to the Bankruptcy Code that made postpetition *condominium* dues nondischargeable in all Chapter 7 and Chapter 11, and some Chapter 13, bankruptcies so long as they accrued during a period in which the debtor continued to either occupy or rent the home. This provision, 11 U.S.C. § 523(a)(16), was significantly expanded in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Protection Act. It now applies to all HOA dues, not just condominium dues, and it applies for any postpetition period in which the debtor maintains any legal, equitable or possessory ownership interest in the home, regardless of whether the debtor occupies or rents the home. In other words, if the debtor "surrenders" his or her home to the bank upon filing for bankruptcy and moves out, but does not actually transfer title to the bank, the debtor may be held personally liable for all HOA dues accruing between the date the debtor filed for bankruptcy and the date his or her home is sold.

This provision was tested in *Brambleton Community Ass'n. v. Than*, 79 Va. Cir. 393 (2009). In *Brambleton*, an HOA sued its former member after the member received a Chapter 7 bankruptcy discharge, seeking to collect nearly a year's worth of HOA dues that accrued between the date of the debtor's bankruptcy and the time her home was sold at auction. The debtor had neither lived in nor rented the home for that entire time. The state court held in favor of the HOA.

Similarly, in *In re Johnson*, 2009 Bankr. LEXIS 1138 (Bankr. D. AZ. 2009), a former Chapter 7 debtor sought a ruling from the bankruptcy court that an HOA had violated the Bankruptcy Code's "discharge injunction" by seeking to collect postpetition dues after she "surrendered" her condominium unit and received a discharge. The bankruptcy court held in favor of the HOA.

### Courts Are Split When It Comes To Chapter 13

One difficulty that has arisen is what happens when an HOA member files for a Chapter 13 bankruptcy. Some courts have held that a debtor may discharge postpetition HOA dues under Chapter 13 so long as the debtor surrenders his or her home and receives a standard Chapter 13 discharge, rather than a so-called "hardship" discharge (in which the debtor is excused from completing payments under his or her Chapter 13 plan). See, e.g., *In re Spencer*, 437 B.R. 563 (Bankr. E.D. Mich. 2010).

However, other courts have held that a Chapter 13 debtor must always pay postpetition HOA dues as long as he or she is legal owner of the home on the theory that the dues constitute "covenants that run with the land" - and not a contractual obligation - and are therefore not dischargeable in bankruptcy. See, e.g., *In re Foster*, 435 B.R. 650 (9th Cir. B.A.P. 2010). Whether the HOA dues in question to constitute property covenants or contract obligations is a matter of state law.

### Postpetition Dues May Be Recoverable As Administrative Expenses

An HOA could also pursue its dues by filing an administrative expense request with the bankruptcy court in the amount of postpetition HOA dues (or some other amount), arguing that it provided "actual and necessary" postpetition services to the debtor's bankruptcy estate and is therefore entitled to payment in full ahead of general creditors. HOAs taking this route have met with mixed results.

In *In re Guillebeaux*, 361 B.R. 87 (Bankr. M.D.N.C. 2007), for example, an

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Sharon Newlon is a Member in Dickinson Wright's Detroit Office. Ms. Newlon served as a member of the State's Part 201 Workgroup and Peer Review group, also participating in the legislative review of the Part 201 Reform Package through the Detroit Regional Chamber. Her background includes over 20 years of experience in environmental transactional, administrative and litigation work, representing lenders, investors and publicly- and privately-held companies in understanding the complex field of environmental laws and regulations. She credits her background in chemistry as a valuable tool in facilitating communication between her clients, their consultants and the regulatory agencies with which they interact. Ms. Newlon is recognized as a "Best Lawyer in America," Michigan Super Lawyer and DBusiness Top Lawyer in environmental law. She has served on the State Bar of Michigan's Environmental Law Section Council and as Co-Chair of the Section's Ethics Committee.

HOA filed an administrative expense request seeking more than \$2,600 in HOA dues that accrued between the time its former member filed for bankruptcy and the date the debtor's home was sold. The bankruptcy court granted the request, stating: "The court is persuaded that . . . [t]he exterior maintenance and common area amenities provided by [the HOA] provided benefit to the estate by preserving the value of the unit and the other units in the community."

Other courts have followed a narrower approach and have denied HOA administrative expense requests where the HOA was unable to show that it was seeking reimbursement for specific expenditures that directly preserved the value of the debtor's home. See, e.g., *In re Hall*, 2010 Bankr. LEXIS 2827 (Bankr. D. Md. 2010).

The lesson here is that an HOA can file an administrative expense request, but it must be prepared to support its request with documentation. Indeed, this strategy may be especially important in a Chapter 13 case for the reasons noted above.

## Concluding Thoughts

When a condominium or homeowners association learns that one of its members has filed for bankruptcy, it should consult an experienced bankruptcy attorney for strategies on cost-effective ways to maximize its recovery. This is particularly true where the debtor continues to occupy the home or "surrenders" the home without transferring title. Pursuing a debtor during or after his or her bankruptcy on the theory that the debtor's debt was not discharged can have serious consequences if the HOA is incorrect. An HOA may also pursue postpetition dues as an administrative expense if it is prepared to prove their value to the bankruptcy estate. Depending on the facts and circumstances of the particular case, there may be other potential avenues for recovery that should be explored with an attorney.

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## SELECT LEGISLATIVE UPDATE SEPTEMBER 2010 - DECEMBER 2010

### ENACTED

#### **Planning Enabling Act Amendments:**

Enrolled SB 726, 2010 PA 105 which became effective June 29, 2010, amends MCL 125.3815 (Michigan Planning Enabling Act) to eliminate exceptions to the general rule that members of a local planning commission must be qualified electors (a person who is 18 or older, has lived in Michigan for at least six months and meets the requirements of local residence provided by law) of a local unit of government. Enrolled HB 6152, 2010 PA 134 which became effective August 2, 2010, amends MCL 125.3803, MCL 125.3807 and MCL 125.3833 to require a local unit's master plan to provide for safe and efficient movement of people and goods by motor vehicles, bicycles, pedestrians and other legal users of streets, the general location, character and extent of the interconnectivity of all components of transportation and expand the definition of street to include public ways intended for use by bicycles, pedestrians and other legal users, in addition to motor vehicles.

**Landlord and Tenant Relationships:** Enrolled SB 185, 2010 PA 199, which became effective October 5, 2010, amends MCL 554.601 to 554.616 (Landlord and Tenant Relationships) to allow for early lease termination for

victims and those reasonably fearful of being a victim (both tenant and his or her children) of domestic violence, sexual assault or stalking. The tenant seeking to leave must submit certain verifications to his or her landlord, depending on the circumstances (e.g. a personal protection order or police report that has resulted in the filing of charges). Other parties to the lease agreement will remain liable under it.

**Commercial Broker Lien Act:** Enrolled SB 610, 2010 PA 201, which became effective October 5, 2010, creates the "Commercial Real Estate Broker's Lien Act". The act allows for the filing of liens for commissions by brokers against commercial real estate in certain circumstances. Statutory forms for the lien and the release of the same, which have to be "substantially met", have been also established by this act.

### PASSED BY CHAMBER

**Affidavits Affecting Real Property:** Addition of New Section 1d: HB 4503 would amend MCL 565.451a-565.453 (1915 PA 123) to allow an affidavit to correct errors or omissions

in previously recorded documents, including errors relating to the proper place of recording and scrivener's errors or omissions, to be recorded in the register of deeds office in the county in which the



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real property that is the subject of the affidavit is located. The House passed HB 4503 on August 26, 2009 and it was referred to the Senate Committee on Land, Urban and State Affairs.

## NEWLY INTRODUCED

**Posting of Legal Notices as Alternatives to Publishing and Expanding Methods for Public Notice Disclosure:** Proposed HB 5826, HB 5827 and HB 5828 would give a new definition of “newspaper” for use in some state statutes that require publication of legal notices, such that where no print publication exists, an online publication that was a continuation of a previously printed newspaper would qualify as a newspaper. Proposed HB 5845, HB 5847, HB 5916, HB 5917, HB 5853 and HB 5848 would allow various municipalities that are required to publish a legal notice in a newspaper of general circulation to satisfy that requirement by posting the legal notice in the office of the municipality, and on the municipality’s website, newspaper website or municipality’s channel operated in such municipality.

**Proposed New “Homeowner Education Fund Act”:** Proposed HB 6544 seeks to create a new act that would require the State registers of deeds to collect a new \$4.00 fee on certain filings and then distribute the proceeds, minus certain operating expenses, to local agencies that “provide housing counseling”, which, in turn, must expend the monies on foreclosure education. As proposed, the act would expire in ten years.

**Amendment to General Property Tax Act:** Proposed HB 6571 and HB 6572 would together enact the “Adverse Construction Specific Tax Act” and amend the General Property Tax Act to allow a local tax collecting unit to exempt a business adversely impacted by a major “construction project” from ad valorem taxes on both real and personal properties for a certain period.



## DICKINSON WRIGHT’S REAL ESTATE AND ENVIRONMENTAL GROUP IS PLEASED TO WELCOME ITS NEWEST MEMBER: J. BRYAN ECHOLS

Bryan Echols joins Dickinson Wright as a member in our Nashville office. Bryan has practiced commercial real estate in Nashville and middle Tennessee for a number of years. A graduate of Vanderbilt University, he served as a judge advocate in the United State Air Force and then returned to Nashville. Since his return, Bryan has worked on land use and zoning matters, residential development, commercial office leasing, and commercial real estate acquisition and development. He also represents lenders in commercial finance transactions.

Bryan also represents conservation groups using conservation easements for the preservation of open space and natural habitats. A board member of the Heritage Foundation of Franklin and Williamson County as well as Franklin Tomorrow, a community visioning organization, Bryan is actively involved in his community.

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